OCBC BANK (MALAYSIA) BHD

v.

TAN ENG KWEE

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-546-99]
19 MAY 2003

CIVIL PROCEDURE: *Interest - Debt - Recovery of amount due - Whether interest to be calculated only up to date of receiving order - Bankruptcy Act 1967, s. 8(2A)*

The plaintiff, by way of a charge action, applied for an order for sale under ss. 256 & 257 of the National Land Code ('NLC') to recover the sum of RM5,289,021.42, inclusive of interest as at 23 January 2003 from the defendant. Previously, a receiving order ("RO") had been made against the defendant on 4 October 2001. Relying upon s. 8(2A) of the Bankruptcy Act ('BA'), the defendant contented that the plaintiff as a secured creditor would not be entitled to any interest in respect of the debt after the RO was made as the plaintiff had not realised his security within six months thereof, *ie*, on or before 4 April 2002.

The issue before this court was whether, upon a proper construction of s. 8(2A) of the BA, the plaintiff was entitled to RM5,212,816.01 inclusive of all interest as at 23 January 2003, or RM4,803,362.60 inclusive of all interest until the making of the said RO on 4 October 2001.

Held:

[1] The plaintiff as a secured creditor under s. 8(2A) of the BA shall not be entitled to any interest in respect of the debt after the receiving order was made on 4 October 2001 if the plaintiff did not, on or before 4 April 2002, convert the money into security, ie, the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the sale order. This was not the case here and therefore after the making of the said receiving order, the plaintiff would not be entitled to any interest regarding the debt in question. (p 165 b-c)

[2] Under s. 256(3) of the NLC, this court made an order for sale and pursuant to s. 257(1)(c) of the same, the total amount due to the chargee, *ie*, the plaintiff, was RM4,803,362.60 at the date on which the order for sale was made. That is, the interest shall accrue until 4 October 2001 in both OS No. 24-546-99 and OS No. 24-648-99. (p 165 g)

[Cost to be paid to plaintiff from excess of sales proceeds, if any.]

Case(s) referred to:

Chinese Tin Mines Rehabilitation Loans Boards v. Official Assignee FM [1957] 23 MLJ 65 HC ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 AMR 369 HC ***(refd)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***

Malayan Banking Bhd v. The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt)) [1993] 2 AMR 28 HC ***(refd)***

Multi Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor [2000] 2 CLJ 73 HC ***(refd)***

Public Bank Bhd lwn. Khaliddin Busu [1998] 3 CLJ Supp 495 HC ***(refd)***

United Asian Bank Bhd v. A Subramaniam (Personal representative of Roshammah (decd)) & Ors [1994] 3 CLJ 681 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(1), (2A)

National Land Code, ss. 256, 257(1)(a), (b), (c), (d)

Rules of the High Court 1980, O. 83 r. 3(3), (6), (7)

For the official assignee - Mohd Hanafiah Kechik

For the plaintiff - Anis Idura Hashim; M/s Shearn Delamore & Co

Reported by M Maheswaran

JUDGMENT

Low Hop Bing J:

Application

These two applications are by consent of the parties herein heard together.

Parties herein have raised an important, interesting and novel question of law to be considered and addressed by this court, in the course of hearing the plaintiff's application on 23 January 2003 by way of a charge action for an order for sale to recover a sum of RM5,289,021.42 which is inclusive of all interest until that date, under ss. 256 and 257 of the National Land Code 1965 ("s. 256 and s. 257") and O. 83 r. 3(3), (6) and (7) of the Rules of the High Court 1980 ("O. 83 r. 3(3), (6) and (7)").

As an alternative, the plaintiff claimed a sum of RM4,803,362.60 being the debt due from the defendant in OS No. 24-546-99, with interest until the making of the receiving order against the defendant on 4 October 2001.

Both the aforesaid sums were stated in the plaintiff's affidavit.

Objection To Interest

At the hearing of this charge action, the defendant, against whom the said receiving order was made on 4 October 2001 *vide* Johor Bahru High Court No. 3635-1999, did not raise any objection to the making of an order for sale but instead resisted that the plaintiff as a secured creditor shall not be entitled to any interest in respect of the debt after the making of the said receiving

order as the plaintiff has not realized the security within six months thereof ie, on or before 4 April 2002. The defendant relied on s. 8(2A) of the Bankruptcy Act 1967 ("s. 8(2A)").

Question For Determination

This may be formulated as follows:

> Upon a proper construction of s. 8(2A), in realizing the security in this charge action, is the plaintiff entitled to RM5,212,816.01 inclusive of all interest as at 23 January 2003 or RM4,803,362.60 inclusive of interest until the making of the said receiving order on 4 October 2001?

Counsel's Submission And Decision By Court

Particulars Under s. 257

En. Mohd Hanafiah bin Kechik, the assistant official assignee who under s. 8(1) of the Bankruptcy Act 1967 ("s. 8(1)") has been constituted the receiver of the property of the debtor ie, the defendant herein, submitted that under s. 8(2A), the plaintiff is only entitled to the total amount of RM4,803,362.60.

Cik Anis Idura Hashim, learned counsel for the plaintiff, submitted that it is mandatory for the plaintiff to provide all the particulars under s. 257(1)(a) to (d).

At this juncture, it must be emphasised immediately that the dispute does not revolve around the question whether or not the plaintiff must provide the particulars under s. 257(1)(a) to (d), as it is trite law that these particulars must be provided in the affidavit under the mandatory provisions of s. 257(1)(c): *Maimunah bte Megat Montak v. Mayban Finance Berhad* [1996] 3 CLJ 9 FC; *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor* [2000] 2 CLJ 73 HC; *Citibank NA v. Ibrahim b Othman* [1994] 1 AMR 369 HC; and O. 83 r. 3(3), (6) and (7).

Interest After Receiving Order

In respect of s. 8(2A), it was submitted for the plaintiff that a secured creditor who is not proving his debt in the bankruptcy of the chargor is entitled to the full amount of his debt with interest and costs, relying on *Chinese Tin Mines Rehabilitation Loans Board v. Official Assignee FM* [1957] 23 MLJ 65 HC; *Malayan Banking Berhad v. The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt))* [1993] 2 AMR 28 HC; and *United Asian Bank Bhd v. A Subramaniam (Personal representative of Roshammah (decd)) & Ors* [1994] 3 CLJ 681 HC.

A careful analysis of these authorities cited for the plaintiff is necessary in order to ascertain the extent of the support that may be derived therefrom.

In *Chinese Tin Mines, supra*, the relevant provisions which came up for cosideration were s. 9(i) and (ii) of the then Bankruptcy Enactment which have now been re-enacted in s. 8(1) and (2), the relevant portions of which are reproduced as follows:

> **8. Effect of receiving order**
>
> (1) On the making of a receiving order ..., no creditor ... shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court ...
>
> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section has not been passed.

After considering the then provisions of s. 9(i) and (ii) *viz.* the precursors of the present s. 8(1) and (2), Thomson J (later LP), held that there was no reason either on authority or on principle why a secured creditor who did not prove in the bankruptcy should be deprived of the interest which the law and his contract allowed him.

Chinese Tin Mines, supra, was followed in *Malayan Banking Berhad, supra*, where Abdul Kadir b. Sulaiman J (now JCA) on 18 October 1993 considered, *inter alia*, s. 8(2).

United Asian Bank Bhd, supra, also appears to follow *Chinese Tin Mines*, and s. 8 was considered on 30 March 1994 by Mahadev Shankar J (later JCA) who held, *inter alia*, that s. 8 did not preclude the bank from effecting recovery against the deceased's estate as the bank was a secured creditor and the judgment debt of the deceased's estate was not provable in the borrower's bankruptcy.

It must be observed that their Lordships in these three judgments were not called upon to consider and determine the ambit or purview of the new provisions contained in s. 8(2A), which came into force on 17 July 1992.

In the circumstances, I am of the view that the thrust of those three judgments could render no assistance to the plaintiff.

Section 8(2A) provides as follows:

> (2A). Notwithstanding sub-section (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.

I shall now proceed to consider and address the ambit and implication of s. 8(2A).

The phrase "Notwithstanding sub-s. (2)" in s. 8(2A) means that s. 8(2) is to be disregarded in so far as it is inconsistent with s. 8(2A) so that the provisions of s. 8(2A) shall prevail and play a predominant role to the exclusion of s. 8(2) which has been rendered subservient to s. 8(2A).

The word "realise" in s. 8(2A) means "convert into money" (see *The Concise Oxford Dictionary* 9th edn).

That being the case, the plaintiff as a secured creditor under s. 8(2A) shall not be entitled to any interest in respect of the debt after the making of the receiving order on 4 October 2001 if the plaintiff did not on or before 4 April 2002 convert into money the security ie, the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the order for sale. This does not appear to be the case here and so after the making of the receiving order on 4 October 2001, the plaintiff is not entitled to any interest in respect of the debt in question.

There is a dearth of authorities on the interpretation of s. 8(2A).

I am mindful of the decision of Faiza Tamby Chik J in *Public Bank Bhd lwn. Khaliddin Busu* [1998] 3 CLJ Supp 495 HC, where a receiving order was made against a chargor of land ie, the defendant on 17 June 1991 which was before the coming into force of s. 8(2A) on 17 July 1992. The learned judge held, *inter alia*, that s. 8(2A) was not intended to have retrospective effect and so s. 8(2) continued to apply, in which case, the interest awarded in the order for sale remained unaffected by s. 8(2A).

In the instant case, as the receiving order was made on 4 October 2001, when s. 8(2A) has already been in force, the question of giving s. 8(2A) retrospective effect does not arise at all. Hence, s. 8(2A) would apply with full force and it is incumbent on the court to give effect to the intention of Parliament which in its wisdom has expressly enacted in clear and unambiguous terms.

Conclusion

By reason of the foregoing grounds, I make an order for sale under s. 256(3) and pursuant to the mandatory provision of s. 257(1)(c), I specify the total amount of RM4,803,362.60 being the amount due to the chargee ie, the plaintiff at the date on which this order for sale is made ie, today.

In other words, interest shall only accrue until 4 October 2001 in both OS No. 24-546-99 and OS No. 24-648-99.

Costs to the plaintiff to be paid from the proceeds of sale if there be any excess.